86 - 1463
NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1986

RAY L. CORONA and
RAFAEL L. CORONA,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE CONSTITUTIONAL PROTECTION AGAINST DOUBLE JEOPARDY BARS A RETRIAL ON A SUPERSEDING INDICTMENT OBTAINED AFTER A HUNG JURY AND DECLARATION OF A MISTRIAL, WHERE THE SUPERSEDING INDICTMENT CHARGES THE SAME ULTIMATE OFFENSE BUT HAS MODIFIED ORIGINAL CHARGES AND ADDED NEW BUT RELATED CHARGES WHICH WERE NOT MADE A PART OF THE ORIGINAL PROSECUTION?

LIST OF INTERESTED PERSONS

The only persons having an interest in the outcome of this case are the Petitioners, their families and the United States of America.

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Petitioners, Ray L. Corona and Rafael L. Corona, respectfully pray that a writ of certiorari issue to review the judgment, opinion, and order on rehearing of the United States Court of Appeals for the Eleventh Circuit, entered in Case No. 86-5287 on December 3, 1986, and February 12, 1987, which affirmed the judgment of the United

States District Court for the Southern District of Florida denying a dismissal of the superseding indictment on double jeopardy grounds.

OPINION BELOW

The United States Court of Appeals for the Eleventh Circuit announced its opinion and judgment affirming the denial of a motion to dismiss the superseding indictment on double jeopardy grounds. That decision is reported as United States v. Corona, 804 F.2d 1568 (11th Cir. 1986). The decision is reproduced in the Appendix. The Court of Appeals denied a Petition for Panel Rehearing and Suggestion for En Banc Consideration on February 12, 1987. That order is included in the Appendix. The appellate court entered a stay of mandate in this case pending the timely filing of a Petition for Writ of

Certiorari by March 10, 1987, and continuing until disposition of the certiorari petition. A copy of that order is included in the Appendix.

JURISDICTION

Jurisdiction is invoked under 28 U.S.C. §1254(1). This petition is filed within the authorized time period following the Eleventh Circuit's order on rehearing. Sup.Ct.R. 20.1.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

> No persons shall be ... subject for the same offense to be twice put in jeopardy of life or limb...

STATEMENT OF THE CASE

On December 11, 1984, a grand jury in the Southern District of Florida

returned a thirty-count indictment charging six defendants with a series of criminal violations arising out of an alleged marijuana enterprise which had as its purposes to import and distribute marijuana, to take control of a financial institution for the purpose of laundering marijuana proceeds, and to defraud the people of the United States and the State of Florida in connection with banking disclosures. Ray L. Corona was charged with six of those counts[1] and Rafael L. Corona was charged in four counts.[2] The four other defendants

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[1] Count 1 charged a RICO conspiracy between January 1977 through the date of the indictment (December 11, 1984); Count 2 charged a RICO enterprise on the same dates; Count 3 charged a conspiracy to import marijuana between January 1977 through March 1981; Count 4 charged importation of marijuana on December 19, 1979; and Counts 23 and 24 charged mail fraud on June 20 and November 27, 1981, respectively.

[2] Charges against Rafael L. Corona included Counts 1, 2, 23 and 24.

were charged in various related counts.

During a ten-week trial, both Coronas mounted a vigorous defense. The government withdrew Counts 3 and 4 as to Ray Corona, and Count 24 as to both Coronas, conceding inadequate proof. At the same time, the government dropped a number of allegations and the corresponding racketeering acts contained within Count 1.[3/] After lengthy jury deliberations, the jury could not reach a unanimous verdict as to either Corona. The district court subsequently declared a mistrial due to the failure of the

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3/ The only racketeering acts against the Coronas for consideration by the jury were: Racketeering Act No. 22 - Travel Act violation of December 21, 1977; Racketeering Act No. 23 - Travel Act violation on May 10, 1978; Racketeering Act No. 24 - Travel Act violation on May 16, 1979; Racketeering Act No. 41 - Mail fraud on January 19, 1978; Racketeering Act No. 42 - Mail fraud on May 19, 1978; Racketeering Act No. 43 - Mail fraud on May 7, 1979; and Racketeering Act No. 43 - Mail fraud on June 30, 1981.

jury to agree on a verdict. Of the other defendants, two were convicted and one was acquitted.

Three months after the discharge of the jury but before retrial, the government obtained a "superseding indictment." This superseding indictment, while charging the same general racketeering conspiracy and enterprise offenses, changed many of the allegations contained within the original counts[4/] and additionally increased the number of charges against the Coronas. The increased counts were not independent offenses, but arose out of the racketeering allegations originally charged. The superseding indictment reflects the following charges:

4/ All changed portions of the superseding indictment reflected information known to and possessed by government witnesses prior to the original trial.

A. Count 1 - RICO Conspiracy.

Although alleged as the same RICO conspiracy contained in Count 1 of the original indictment, the new charge substantially changes the date of the conspiracy to include mid-1976 through and including the return of the superseding indictment on December 20, 1985.5/ The superseding indictment added corporate entities to the enterprise allegations and deleted a substantial number of companies from the list. Previous defendants were alleged to be merely coconspirators, while former defendant Vaughn was eliminated totally from the indictment. References to Ray

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5/ According to the new grand jury allegations, the racketeering conspiracy existed during the original trial, notwithstanding that the principal defendant, Jose Antonio Fernandez, had pled guilty and was a government witness during that entire proceeding and no evidence was presented at the initial trial that any conspiracy was ongoing.

Corona's involvement with marijuana were deleted. Numerous racketeering acts changed, including the addition of specific acts of racketeering not contained within the original indictment and racketeering acts which differed from the original indictment. Count 1 also includes new overt acts and deletes other overt acts.

B. Count 2 - RICO Enterprise. As with Count 1, the time period during which this violation occurred was broadened from the original indictment.

C. Counts 3 through 5 - Mail Frauds Occurring on June 30, 1981, and January 3 and April 22, 1982. The superseding indictment broadened the time frame of the charged fraudulent scheme and alleged additional means of committing the offense. Count 3 is the equivalent of original Count 23. Counts 4 and 5, while alleged to be a part of

the same fraudulent scheme originally alleged, are new charges.

D. Counts 6 through 8 - Travel Act Violations. These charges did not appear in the original indictment.

During the pretrial stages of this case following the declaration of a mistrial and the return of the superseding indictment, the Coronas sought dismissal of the superseding indictment on double jeopardy and vindictive prosecution grounds. The district court denied the dismissal motion and the Coronas immediately initiated an appeal. Proceedings in the district court were stayed by the Eleventh Circuit pending disposition.

On December 3, 1986, the Eleventh Circuit, in United States v. Corona, 804 F.2d 1568 (11th Cir. 1986), affirmed the decision of the district court denying the double jeopardy dismissal. The

panel concluded that no double jeopardy violation occurs as a result of a retrial on a superseding indictment under any circumstances. The court stated, at 1570:

> We now set forth the proper application of the two principles of law to this case. Since the mistrial here as a result of the hung jury did not terminate the jeopardy which had attached to the defendants, the retrial of the defendants was not double jeopardy. Richardson v. United States, 468 U.S. at 325, 104 S.Ct. at 3086. Since the superseding indictment allowed ample time for defendants' preparation prior to retrial, it was analogous to a superseding indictment before trial and was not analogous to a superseding indictment during trial. United States v. Edwards, 777 F.2d at 649.

The rationale for the court's decision, found at 1571, is the following:

> Our conclusion that no double jeopardy problem is implicated here also comports with common sense. It has long been established that a defendant can be retried on the same charges following a mistrial. See Richardson, 468 U.S. at

> 323, 104 S.Ct. at 3085. It is also clear that one who has been either acquitted or convicted of a particular offense can nonetheless be indicted and tried on a new offense, so long as the new offense is separate from the previous charge. [footnote omitted] Therefore, it makes no sense to argue, as defendants do, that the defendants, whose trial ended in a mistrial, can be retried on the same charges, and can be retried on completely separate and additional charges, but cannot be retried on some lesser amendment of the existing charges. [footnote omitted]

It is this ruling for which certiorari review is sought. The court denied a petition for rehearing and for rehearing en banc on February 12, 1987, but granted a stay of mandate to March 10, 1987, so as to allow Petitioners the opportunity to petition this court for review of this issue of great public importance.

REASONS FOR GRANTING THE WRIT

THE CONSTITUTIONAL PROTECTION AGAINST DOUBLE JEOPARDY BARS A RETRIAL ON A SUPERSEDING INDICTMENT OBTAINED AFTER A HUNG JURY AND DECLARATION OF A MISTRIAL, WHERE THE SUPERSEDING INDICTMENT CHARGES THE SAME ULTIMATE OFFENSE BUT HAS MODIFIED ORIGINAL CHARGES AND ADDED NEW BUT RELATED CHARGES NOT A PART OF THE ORIGINAL PROSECUTION.

The constitutional protection against double jeopardy bars retrial of a defendant on a superseding indictment obtained after a hung jury and declaration of a mistrial. This conclusion is evident from an examination of the constitutional guarantee against twice being placed in jeopardy. U.S. Const. amend. V. This case presents a fundamental constitutional issue of substantial importance which, although addressed obliquely in Richardson v. United States, 468 U.S. 317, 104 S.Ct. 3081 (1984), was mischaracterized and

erroneously rejected by the appellate court below. Bottomed on the Richardson principle of "continuing jeopardy," this case concerns the extent to which an accused can be protected by the Double Jeopardy Clause when the prosecution, in an effort to secure a conviction after a hung jury, obtains a superseding indictment which modifies original charges and adds additional charges which are alleged to be a part of the original criminal scheme.

At stake in this case is the essence of our justice system, which is designed to afford to each accused person the opportunity to have the charges to which jeopardy attached determined. The same criminal justice system also is intended to protect persons from repeated governmental assault under the guise of prosecution attempts to prove again and again the core facts which are

made a part of the charges. With the decision of the Eleventh Circuit, the government has been given unfettered authority to bring defendants to trial and, if that trial is unsuccessful, to tamper with the original indictment, by changing allegations, adding counts, and blunting the accused's trial defense. The government, moreover, has received approval to alter the balance of protections afforded by the Double Jeopardy Clause in that it now can use a first trial as a test run of its case.

Contrary to constitutional considerations of double jeopardy and at odds with principles of fundamental fairness, the Court of Appeals has validated government efforts to retry the Coronas on a superseding indictment obtained after the Coronas defended the original charges during trial which ended in a hung jury. The government

action circumvents the protections of the double jeopardy clause by forcing the Coronas to trial a second time on charges which, although involving the same criminal conduct, substantially alter the case. Although the government has an absolute right to retry both Coronas as a consequence of the hung jury, the retrial must be on the original indictment as presented to the initial jury.

A. The Double Jeopardy Clause -- Protection Against Successive Prosecutions.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." This constitutional protection, which is older than the Constitution itself, see Crist v. Bretz, 437 U.S. 28, 32-35, 98 S.Ct. 2156, 2159-2160 (1978), embodies the guarantee of the common-law

plea of former jeopardy. See United States v. Wilson, 420 U.S. 332, 339, 340, 95 S.Ct. 1013, 1019-1020 (1975). The double jeopardy protection is enforced principally through restraining courts and prosecutors in matters implicating second trial proceedings. Brown v. Ohio, 432 U.S. 161, 165, 97 S.Ct. 2221, 2225 (1977). As recognized in United States v. Wilson, 420 U.S. at 346, 95 S.Ct. at 1023, the "controlling constitutional principle" of double jeopardy focuses on the prohibition against multiple trials.

> At the heart of this policy is the concern that permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm Government with a potent instrument of oppression. The Clause, therefore, guarantees that the State shall not be permitted to make repeated attempts to convict the accused, "thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continual state of anxiety and insecurity as well

as enhancing the possibility that even though innocent he may be found guilty." Green v. United States, 355 U.S. 184, 187-188, 78 S.Ct. 221, 223 (1957); see also Downum v. United Staes, 372 U.S. 734, 736, 83 S.Ct. 1033, 1034 (1963). "[S]ociety's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws." United States v. Jorn, 400 U.S. 470, 479, 91 S.Ct. 547, 554 (1971)(Harlan, J.).

United States v. Martin Linen Supply Co., 430 U.S. 564, 569, 97 S.Ct. 1349, 1353 (1977)(footnote omitted).6/

6/ The principle that no one shall be put twice in jeopardy for the same offense has been declared by jurists to be part of the universal law of reason, justice, and conscience. See, e.g., United States v. Keen, 27 F.Cas. 510, 686 (No. 15)(1839). Commentators have expressed the view that the right not to be put in jeopardy a second time is as essential as the right to a trial by jury, if not more important. Sigler, Double Jeopardy: The Development of a (fn.Cont.)

Although this double jeopardy protection is variously described and is often misunderstood, the fundamental component of double jeopardy is evident from the seminal decision in United States v. Ball, 163 U.S. 662, 669, 16 S.Ct. 1192 (1896): "The prohibition is not against being twice punished, but against being twice put in jeopardy...." The constitutional protection, then, relates to the risk that an accused for a second time will be convicted of the same offense for which he was initially tried. See Price v. Georgia, 398 U.S. 323, 326, 90 S.Ct. 1757, 1759 (1970).

The protections afforded by the Double Jeopardy Clause begin only when an accused first has been placed in jeopardy. Serfass v. United States, 420 U.S. 377, 95 S.Ct. 1055 (1975). Once jeopardy has attached, the Constitution

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Legal and Social Policy at v (1969).

does not prohibit all second or successive trials. As long ago as 1829, Justice Story, speaking for the court in United States v. Perez, 9 Wheat. 579, 580, 6 L.Ed. 165 (1829), recognized that a **second trial** on the same charges following the declaration of a mistrial for a hung jury is consistent with double jeopardy principles because the parties are entitled to a **determination of the charges**. As declared more recently in Arizona v. Washington, 434 U.S. 497, 509, 98 S.Ct. 824, 832 (1978):

> [W]ithout exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial. This rule accords recognition to society's interest in giving the prosecution **one complete opportunity** to convict those who have violated its laws. [Emphasis added].

Even though a retrial in such circumstances has the practical effect of a second prosecution for the same offense,

it is "the policy behind the Double Jeopardy Clause [that] does not require prohibition of the second trial." Jeffers v. United States, 432 U.S. 137, 152, 97 S.Ct. 2207, 2217 (1977).

B. Superseding Indictments -- Limited By Double Jeopardy Protections.

Although the government has broad discretion to lodge charges against an accused, that discretion is not "unfettered" but is limited by constitutional considerations. United States v. Batchelder, 442 U.S. 114, 125, 99 S.Ct. 2198, 2205 (1979); Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct. 663, 668 (1978). The Eleventh Circuit decision under review rejects in wholesale fashion any limitation on the prosecution's charging authority even when the defendant has already proceeded to trial.

The concept of "continuing jeopardy" -- totally misunderstood by the appellate court -- is designed to function as a check on government power and prevent the government from doing what it could not do during the course of a single trial: change a charging document. There is no doubt that the government cannot obtain a superseding indictment during the course of a trial once jeopardy has attached. United States v. Cole, 755 F.2d 748, 757 (11th Cir. 1985); United States v. Del Vecchio, 707 F.2d 1214, 1216 (11th Cir. 1983).7/ Continuing jeopardy, quite

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7/ "The term 'superseding indictment' refers to a second indictment issued in the absence of a dismissal of the first." United States v. Rojas-Contreras, __ U.S. __, 106 S.Ct. 555, 559 (1985)(Blackmun, J., concurring). The return of a superseding indictment does not constitute dismissal of an earlier indictment. United States v. Cerilli, 558 F.2d 697, 700 (3d Cir.), cert. denied, 434 U.S. 966, 98 S.Ct. 507 (1977)(where two indictments are out-
(fn.Cont.)

simply, means that the same restrictions control in the event of a hung jury mistrial. That means that a retrial is permissible, but upon the same charges and not some modification designed to bring additional prejudice to the defendants.

At the core of these approved but limited exceptions to the rule prohibiting retrials for the same offense is the principle that a prosecution should run its full course to conclusion. For, while a mistrial in a hung jury situation terminates the trial, it does not end that "prosecution" nor does it conclude the defendant's double jeopardy protections. This was the central theme of the decision in Richardson v. United

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standing against an accused charging same offenses, government may elect upon which indictment to proceed.); United States v. Holm, 550 F.2d 568 (9th Cir.), cert. denied, 434 U.S. 856, 98 S.Ct. 176 (1977).

States, 468 U.S. 317, 104 S.Ct. 3081 (1984), in which this court set forth its view of "continuing jeopardy," a constitutional concept which recognizes that once jeopardy has attached, that same jeopardy continues through a hung jury mistrial until the prosecution is finally terminated. Thus, retrial proceedings following a hung jury are but a part of the original trial -- a continuation of the original jeopardy. The prosecution is permitted, therefore, to continue with a trial only on those charges which are contained within the continuing jeopardy. Thus, in more abstract terms, the retrial is really a part of the original trial. While the government can drop charges during trial or make variations, it cannot substitute new charges or a new indictment. Modification of the same charges in any way other than by reducing them to the

defendant's benefit is unconstitutional. Especially where a superseding indictment includes new charges which are derived from the original underlying crimes and do not stand on their own as independent offenses, retrial on the new charges is tantamount to making the defendant run the gauntlet anew.

The constitutional limitation against superseding indictments following a hung jury is a necessary part of double jeopardy protections. This is especially so where the "new" indictment takes a new look at the case, modifies the charges with a view toward assuring a conviction by eliminating the portions of the original indictment which did not enhance the case, and adds related charges which could not be the subject of a separate prosecution. The sinister aspect of this case is that the government has gone through a process of edit-

ing, revising, and redacting the indictment which is far more than "trivial" or "innocuous." See Stirone v. United States, 361 U.S. 212, 127, 80 S.Ct. 270 (1960); United States v. Colasurdo, 453 F.2d 585, 591 (2d Cir. 1971), cert. denied, 406 U.S. 917, 92 S.Ct. 1766 (1972), quoting Russell v. United States, 369 U.S. 749, 770, 82 S.Ct. 1038 (1962). This case does not present a legal issue involving a restatement of the original charges and then the addition of distinct charges of a different genre. See United States v. Edwards, 777 F.2d 644, 649 (11th Cir. 1985)(prior to jeopardy attaching, tax charges were added to an indictment previously charging only drug related offenses); Howard v. United States, 372 U.S. 294, 299-300 (9th Cir.), cert. denied, 388 F.2d 915, 87 S.Ct. 2129 (1967)(superseding indictment added new counts of preparation of

false tax returns involving different taxpayers). The law as explained by the Eleventh Circuit in rejecting constitutional limitations on the power of the prosecution to charge crimes effectively eliminates the constitutional caveat offered by the court in Arizona v. Washington, 434 U.S. at 508 n.24, 98 S.Ct. at 832 n.24: "The prohibition against double jeopardy unquestionably forbids the prosecutor to use the first proceeding as a trial run of his case."8/

8/ In Green v. United States, 355 U.S. 184, 187-188, 78 S.Ct. 221, 223-224 (1957), the court explained:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment,

(fn.Cont.)

The continuing jeopardy limitation at issue before this court is but a constitutional focus for the established rule that the double jeopardy clause precludes the government from placing a defendant in jeopardy more than once by subdividing a single charge into multiple charges and pursuing successive prosecutions. See United States v. Vaughan, 715 F.2d 1373, 1375 (9th Cir. 1983); United States v. Bendis, 681 F.2d 561, 563 (9th Cir. 1981), cert. denied, 459 U.S. 973, 103 S.Ct. 306 (1982). The failure to follow this constitutional rule is at the heart of the Eleventh Circuit's erroneous opinion. The court viewed this issue as little more than an attempt by the government to join

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> expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

separate charges into a superseding indictment:

> Our conclusion that no double jeopardy problem is implicated here also comports with common sense. It has long been established that a defendant can be retried on the **same** charges following a mistrial. See Richardson, 468 U.S. at 323, 104 S.Ct. at 3085. It is also clear that one who has been either acquitted or convicted of a particular offense can nonetheless be indicted and tried on a **new** offense, so long as the new offense is separate from the previous charge. Therefore, it makes no sense to argue, as defendants do, that the defendants, whose trial ended in a mistrial, can be retried on the same charges, and can be retried on completely separate and additional charges, but cannot be retried on some lesser amendment of the existing charges.

That erroneous belief was exacerbated by footnote 2 of the Eleventh Circuit's decision:

> Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182 (1931), sets out the test for determining whether or not the new offense is a separate offense.

> Since the additional, new counts of mail fraud and Travel Act violations in this case would satisfy the Blockburger test, a new trial on these charges would clearly be permissible. Defendants have not argued, nor could they on these facts, that joining the new charges with the old charges would violate the standard for joinder of offenses. See Fed.R.Crim.P. 13.

These incorrect pronouncements totally avoid the continuing jeopardy precedent, and place the Eleventh Circuit in a position of eliminating a central tenet of the Double Jeopardy Clause. It is not true that the "new" charges in the superseding indictment stand alone and could be the object of a separate indictment. Rather, the new charges of mail fraud and Travel Act violations -- Counts 4-8 -- are crimes only when they are made a part of the racketeering enterprise. Manifestly, the mere mailing of a document or an interstate travel do not become criminal

acts unless they further the unlawful racketeering scheme, a crime to which jeopardy has attached.

Because the evidence of these "new" offenses is so intertwined with and inseparable from the main racketeering allegations, the rule of compulsory joinder precludes the government from trying charges that were omitted from the first indictment and trial. See Illinois v. Vitale, 447 U.S. 410, 419-421, 100 S.Ct. 2260, 2267 (1980) (standard for evaluating successive prosecutions requires application of the same-actual-evidence test). See also Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182 (1931) (double jeopardy evaluation for separate punishment for convictions obtained in a single prosecution requires analysis of whether offenses require proof of a fact not required by the other). To conclude

otherwise in a case like this gives the government has carte blanche to do that which was condemned in Garrett v. United States, 471 U.S. 773, 105 S.Ct. 2407, 2417 (1985):

> We do not think that the Double Jeopardy Clause may be employed to force the Government's hand in this manner, however we were to resolve Garrett's lesser-included-offense argument. One who insists that the music stop and the piper be paid at a particular point must at least have stopped dancing himself before he may seek such an accounting.

It is the government in this case that refuses to stop dancing, yet it insists that the jeopardy which it initiated at the start of the original trial now stop and that a new jeopardy begin with the trial of the superseding indictment.

C. Hung Jury Does Not Undo Double Jeopardy Protections.

Solely by reason of the government's calculated actions in this case following the declaration of a mistrial,

the Coronas are in an unusually, and constitutionally dangerous, predicament. The government action is premised on the incorrect view that a hung jury wipes the double jeopardy slate clean, thereby permitting the government to start anew, beginning with the filing of a new charging document. That view is not the law. Rather, a hung jury is but an event in the continuum of proceedings which commence with the attachment of jeopardy and conclude with a jury's unanimous verdict.

A close examination of Richardson demonstrates why the Corona's conclusion is unassailable and the Eleventh Circuit's holding is erroneous. In Richardson, the defendant was indicted on three separate drug charges. The jury acquitted as to one charge but hung as to the remaining two counts. The court declared a mistrial. The defen-

dant argued that retrial was barred by the Double Jeopardy Clause because of insufficient evidence presented at trial. The appellate process was invoked under Abney, but the court of appeals ruled that the defendant's claim was not completely collateral to the merits of the charge against him.

This court rejected the merits of the double jeopardy claim on certiorari review, holding that the clause is not violated by retrial following the failure to adduce sufficient proof to establish guilt beyond a reasonable doubt at a first trial which ends in declaration of a mistrial because of a hung jury. Richardson contended that his position was supported by Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141 (1978), where it was held that once a defendant obtains an unreversed appellate ruling that the government has

failed to introduce sufficient evidence to convict at trial, a second trial is barred by the Double Jeopardy Clause. To evaluate the impact of Burks, in a setting where a mistrial has been granted, now-Chief Justice Rehnquist turned first to cases evaluating the impact of the Double Jeopardy Clause in situations where a mistrial has been declared as a result of a hung jury. United States v. Perez, 9 Wheat. 579, 6 L.Ed. 165 (1824), held that failure of the jury to agree was an instance of "manifest necessity" permitting termination of the first trial and a retrial, because an opposite result would cause "the ends of public justice ... to be defeated." Id. at 580. Since that early opinion, the court has consistently held that retrial following a hung jury does not violate the Double Jeopardy Clause. 104 S.Ct. at 3085.

The court found that the principles governing Burks and the principles underlying the decisions in the hung jury cases were readily reconciled by an evaluation of when and in what instances an event terminates the original jeopardy. 104 S.Ct. at 3086. Richardson's argument necessarily assumed that judicial declaration of a mistrial is an event terminating jeopardy. This conclusion, however, is incorrect and irreconcilable with the legacy of the mistrial cases. The court held that "the failure of the jury to reach a verdict is not an event which terminates jeopardy." 104 S.Ct. at 3086. This is to be contrasted with the situation in Burks, where an appellate determination of legal insufficiency is the equivalent of an acquittal which does terminate jeopardy. The court concluded:

> ...we reaffirm the proposition that a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which petitioner was subjected. The Government, like the defendant, is entitled to resolution of the case by verdict from the jury, and jeopardy does not terminate when the jury is discharged because it is unable to agree.

104 S.Ct. at 3086.

In Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 104 S.Ct. 1805 (1984), this court expressly utilized the Richardson continuing jeopardy rule in reaching its decision. Lydon involved the Massachusetts two-tier trial system. In Massachusetts, some charges may be resolved by a bench trial to be followed, at the defendant's choice, by a de novo jury trial on the same charges. The court held that a defendant has no right to review the sufficiency of the evidence at the bench trial prior to electing his choice to

begin anew at a jury trial on the same charges. The court found that the second trial, before a jury, was merely a continuation of the same jeopardy begun by the bench trial. Under the continuing jeopardy rule, double jeopardy is not an absolute bar to successive trials; reprosecution is permitted, for instance, where a defendant's conviction is overturned on appeal. Implicit in this retrial authorization is that the rule permitting retrial after reversal of a conviction is conceptually satisfied by the constitutional notion of continuing jeopardy. That principle is applicable where a criminal proceeding against an accused has not run its full course, as occurs in the case involving the Coronas and permits a retrial on the same charging document.

In Lydon, the proceeding had not run its full course. Society as well as the parties have an interest in reaching a **final resolution** of a dispute. The continuing jeopardy principle permits this. In Lydon, because the defendant elected to continue the proceeding, the jeopardy that had attached to the swearing of the first witness at the bench trial continued into the jury proceeding. Clearly, swearing of the jury at the second trial was not a new instance of jeopardy, rather, original jeopardy proceeded apace from the bench trial. 104 S.Ct. at 1814.

The only conclusion available in light of Richardson is that a superseding indictment following a hung jury constitutes an unconstitutional interference with the jeopardy to which the Coronas have been, and are now being, subjected. The posture of the present

case enhances the risk that innocent defendants may be convicted, which always has been an important ingredient in the double jeopardy analysis. In Casey v. United States, 392 F.2d 810, 813-814 (D.C. Cir. 1967), Circuit Judge Leventhal described how minor changes in the prosecution's evidence, initially favorable to the accused, may occur during the course of multiple prosecutions:

> [T]he Government witnesses came to drop from their testimony impressions favorable to the defendant. Thus a key prosecution witness, the last person to see appellant and the deceased together, who began by testifying that they had acted that evening like newlyweds on a honeymoon, without an unfriendly word spoken, ended up by saying for the first time in four trials that the words between them had been "firm," and possibly harsh and "cross."
>
> We also noted that the police officer who readily acquiesced in the two "hung jury" trials that appellant was "hysterical," later withheld that characterization. This

> shift, though less dramatic, was by no means inconsequential in view of the significance of appellant's condition at the time he made a statement inconsistent with what he later told another officer.

See also Green v. United States, 355 U.S. at 187-188, 78 S.Ct. at 223 (repeated attempts to convict person for same offense enhances possibility of convicting the innocent). The Constitution "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." Burks v. United States, 437 U.S. at 11, 98 S.Ct. at 2147. Viewed in this light, this court cannot allow the government to convert a hung jury into a situation which permits it to reprosecute the Coronas on a new, broadened and amended indictment.

CONCLUSION

For the above-stated reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail this 10th day of March 1987 to Solicitor General, U.S. Department of Justice, Washington, D.C. 20530, and Thomas Blair and Daniel Cassidy, Assistant United States Attorneys, 155 South Miami Avenue, Miami, Florida 33130-1693.

By Benedict P. Kuehne
BENEDICT P. KUEHNE

86 - 1468

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October TERM 1986

RAY L. CORONA and
RAFAEL L. CORONA,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5287

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RAY L. CORONA and RAFAEL L. CORONA,

Defendants-Appellants.

Appeal from the United States
District Court for the
Southern District of Florida

Before VANCE and ANDERSON,
Circuit Judges, and PITTMAN,
Senior District Judge

Opinion filed December 3, 1986

CORRECTED OPINION

ANDERSON, Circuit Judge:

The issue in this case is whether retrial of the defendants following a hung jury violates the double jeopardy clause when there has been a superseding indict-

ment which expands upon the original charges. We hold that there is no violation of the double jeopardy clause.

Defendants Ray Corona and Rafael Corona were charged in the original indictment with numerous counts of racketeering and racketeering conspiracy, as well as various related predicate offenses which were all incorporated into the racketeering and racketeering conspiracy counts. The indictment alleged that the Coronas, along with several co-defendants, were part of a marijuana smuggling syndicate. This enterprise was engaged in the illegal brokering of multi-ton loads of marijuana imported from Colombia and the laundering of the drug proceeds through various banks in the United States and Panama through the creation of sham corporations. Forty-eight separate acts of racketeering were alleged in the original indictment. These acts fell into five statutory groups: (1) drug

offenses, in violation of various Title 21 provisions; (2) Travel Act violations, relating to promoting, managing, establishing and carrying on an unlawful marijuana business enterprise, in violation of 18 U.S.C. §1952(a)(3); (3) Travel Act violations relating to the distribution of proceeds from an unlawful marijuana business enterprise, in violation of 18 U.S.C. §1952(a)(1); (4) mail frauds, in violation of 18 U.S.C. §1351; and (5) wire frauds relating to money laundering in violation of 18 U.S.C. §1343.

During the ten-week jury trial, the government withdrew two counts as to Ray Corona and one count as to both Ray Corona and Rafael Corona, conceding that it had not presented adequate proof as to those charges. After lengthy jury deliberations, the jury announced that it could not reach a unanimous verdict as to either Ray Corona or Rafael Corona on the remaining charges.

The district court therefore declared a mistrial due to the failure of the jury to agree on a verdict as to the Coronas. Of the other three defendants, two were convicted and one was acquitted.

Three months after the discharge of the jury, the government sought and received a superseding indictment from the grand jury. This superseding indictment limited allegations to Ray Corona and Rafael Corona only, and did not substantially change the general allegations of racketeering and conspiracy set forth in the original indictment. However, several specific charges were altered, some new charges were added, and other charges were deleted. The most significant of these changes were as follows: an expansion of the dates of the alleged conspiracy, adding six months at the beginning of the eight-year conspiracy and twelve months at the end (reflecting the time between the

indictments, during which time the enterprise allegedly continued operations); the addition of new overt acts in furtherance of the conspiracy; and additional counts of mail fraud and Travel Act violations.

The Coronas sought dismissal of the superseding indictment based on double jeopardy grounds. The district court denied the motion, and the Coronas filed this appeal to the Eleventh Circuit. They sought a stay from the district court pending disposition of the interlocutory appeal; the district court denied the motion, without making a findng that the double jeopardy claim was frivolous or dilatory. The Coronas renewed their request for a stay before the Eleventh Circuit, which found the Coronas' double jeopardy claim colorable and therefore granted the stay. Having heard argument on the merits, we now affirm the district court's holding that no double jeopardy

violation would occur as a result of a retrial on the superseding indictment.

I. JURISDICTION

As a threshold matter, we note that this court has jurisdiction to hear this interlocutory appeal under the authority of Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). Abney held that a district court's pretrial order denying a defendant's motion to dismiss an indictment on colorable double jeopardy grounds was a "final decision" and was therefore immediately appealable. See also United States v. Dunbar, 611 F.2d 985 (5th Cir.)(en banc), cert. denied, 447 U.S. 926, 100 S.Ct. 3022, 65 L.Ed.2d 1120 (1980); United States v. Cerilli, 558 F.2d 697 (3d Cir.), cert. denied, 434 U.S. 966, 98 S.Ct. 507, 54 L.Ed.2d 452 (1977). We are thus able to reach the merits of the Coronas' double jeopardy argument.

II. DOUBLE JEOPARDY IMPLICATIONS OF A SUPERSEDING INDICTMENT FOLLOWING A HUNG JURY

The defendants strongly argue that double jeopardy prevents the return of a superseding indictment following a hung jury. They base their argument on two well-established principles of law. First, defendants rely on the concept of "continuing jeopardy," set forth in Richardson v. United States, 468 U.S. 317, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984). Justice Rehnquist, writing for the majority in Richardson, used the concept of continuing jeopardy to explain why retrial after a hung jury was not barred by the double jeopardy clause. Since jeopardy was not terminated by the declaration of a mistrial, it could not be double jeopardy to retry the defendant.

The second principle of law relied upon by defendants holds that a superseding indictment cannot be brought once a trial

on the merits has begun. See United States v. DelVecchio, 707 F.2d 1214, 1216 (11th Cir. 1983); United States v. Cole, 755 F.2d 748, 757 (11th Cir. 1985).

Defendants combine the foregoing principles of law, arguing that since this case involves continuing jeopardy under Richardson, then this case is like a single trial for jeopardy purposes and a superseding indictment cannot be brought once the trial has begun. The defendants have linked together two unrelated principles of law and have sought to draw conclusions which go beyond the purpose and rationale of the two established principles. Defendants' argument lacks froce when we consider the rationale behind disallowing superseding indictments during a trial on the merits. The implicit rationale behind such holdings is that a defendant should have advance notice of the charges against him. See, e.g., United States v. Edwards,

777 F.2d 644, 649 (11th Cir. 1985)(additional charges in superseding indictment put defendants on notice, in a timely manner, of those charges against which they had to defend), cert. denied, _ U.S. _, 106 S.Ct. 1645, 90 L.Ed.2d 189 (1986); United States v. Wilks, 629 F.2d 669, 672 (10th Cir. 1980)(holding that superseding indictment before trial was not prejudicial to defendant since it presented no factual questions that should not have been answered by defendant's investigation of original indictment). Changes in the substance of the indictment, therefore, should not be foisted upon a defendant after trial begins. However, this rationale does not apply in the current context. After a mistrial because the jury hung or for any other such reason, the defendant would have ample time to prepare for his defense under a superseding indictment. Therefore, even though jeopardy has attached to the defen-

dant, the practical effect of a superseding indictment after a hung jury is no different from one returned with ample time before a trial on the merits.

We now set forth the proper application of the two principles of law to this case. Since the mistrial here as a result of the hung jury did not terminate the jeopardy which had attached to the defendants, the retrial of the defendants was not double jeopardy. Richardson v. United States, 468 U.S. at 325, 104 S.Ct. at 3086. Since the superseding indictment allowed ample time for defendants' preparation prior to retrial, it was analogous to a superseding indictment before trial and was not analogous to a superseding indictment during trial. United States v. Edwards, 777 F.2d at 649.

Although we have found no cases in this circuit squarely on point, the Ninth Circuit in Howard v. United States, 372

F.2d 294, 299-300 (9th Cir.), cert. denied, 388 U.S. 915, 87 S.Ct. 2129, 18 L.Ed.2d 1356 (1967), addressed a very similar issue. The Howard court rejected a double jeopardy challenge and expressly approved a superseding indictment following a mistrial occasioned by a hung jury. The superseding indictment there included several of the counts of the original indictment as to which the jury had hung and added several new charges as well. The Second Circuit has also permitted a superseding indictment following a hung jury. United States v. Sonnenschein, 565 F.2d 235 (2d Cir. 1977). See also United States v. Cerilli, 558 F.2d at 700-701 (rejecting a double jeopardy challenge to a superseding indictment following a mistrial for reasons other than a hung jury).1/

1/ This circuit rejected a prosecutorial vindictiveness challenge to a (fn.Cont.)

Our conclusion that no double jeopardy problem is implicated here also comports with common sense. It has long been established that a defendant can be retired on the same charges following a mistrial. See Richardson, 468 U.S. at 323, 104 S.Ct. at 3085. It is also clear that one who has been either acquitted or convicted of a particular offense can nonetheless be indicted and tried on a new offense, so long as the new offense is separate from the previous charge.2/ Therefore, it makes

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superseding indictment following a hung jury, United States v. Mays, 738 F.2d 1188 (11th Cir. 1984), but was not faced with a double jeopardy claim. Since appellants have not presented in this appeal the issue of whether prosecutorial vindictiveness played a role in the decision to obtain a superseding indictment, we need not address the issue.

2/ Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1931), sets out the test for determining whether or not the new offense is a separate offense.

Since the additional, new counts of mail fraud and Travel Act violations in this case would satisfy the Blockburger (fn.Cont.)

no sense to argue, as defendants do, that the defendants, whose trial ended in a mistrial, can be retired on the same charges, and can be retried on completely separate and additional charges, but cannot be retried on some lesser amendment of the existing charges.3/

For the foregoing reasons, we find the Coronas' arguments without merit.

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test, a new trial on these charges would clearly be permissible. Defendants have not argued, nor could they on these facts, that joining the new charges with the old charges would violate the standard for joinder of offenses. See Fed.R.Crim.P. 13.

3/ The change of dates in the subsequent indictment constitutes such an amendment of existing charges.

We need not decide whether the allegations of new overt acts in the superseding indictment constitute an amendment of existing charges or merely new evidence with regard to the same charges, since either way they pose no double jeopardy problem.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5287

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAY L. CORONA and
RAFAEL L. CORONA,

Defendants-Appellants.

- - - - - - - - - - - - -

Appeal from the United States
District Court for the
Southern District of Florida

- - - - - - - - - - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion December 3, 1986, 11 Cir., 1986, _ F.2d _).

(February 12, 1987)

Before VANCE and ANDERSON, Circuit Judges, and PITTMAN*, Senior District Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on re-

hearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5287

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAY L. CORONA and
RAFAEL L. CORONA,

Defendants-Appellants.

- - - - - - - - - - - - -

Appeal from the United States
District Court for the
Southern District of Florida

- - - - - - - - - - - - -

O R D E R:

The motion of appellants, Ray L. Corona and Rafael L. Corona, for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including March 10, 1987, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court

the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

No. 86-1463

In the Supreme Court of the United States

OCTOBER TERM, 1986

RAY L. CORONA AND RAFAEL L. CORONA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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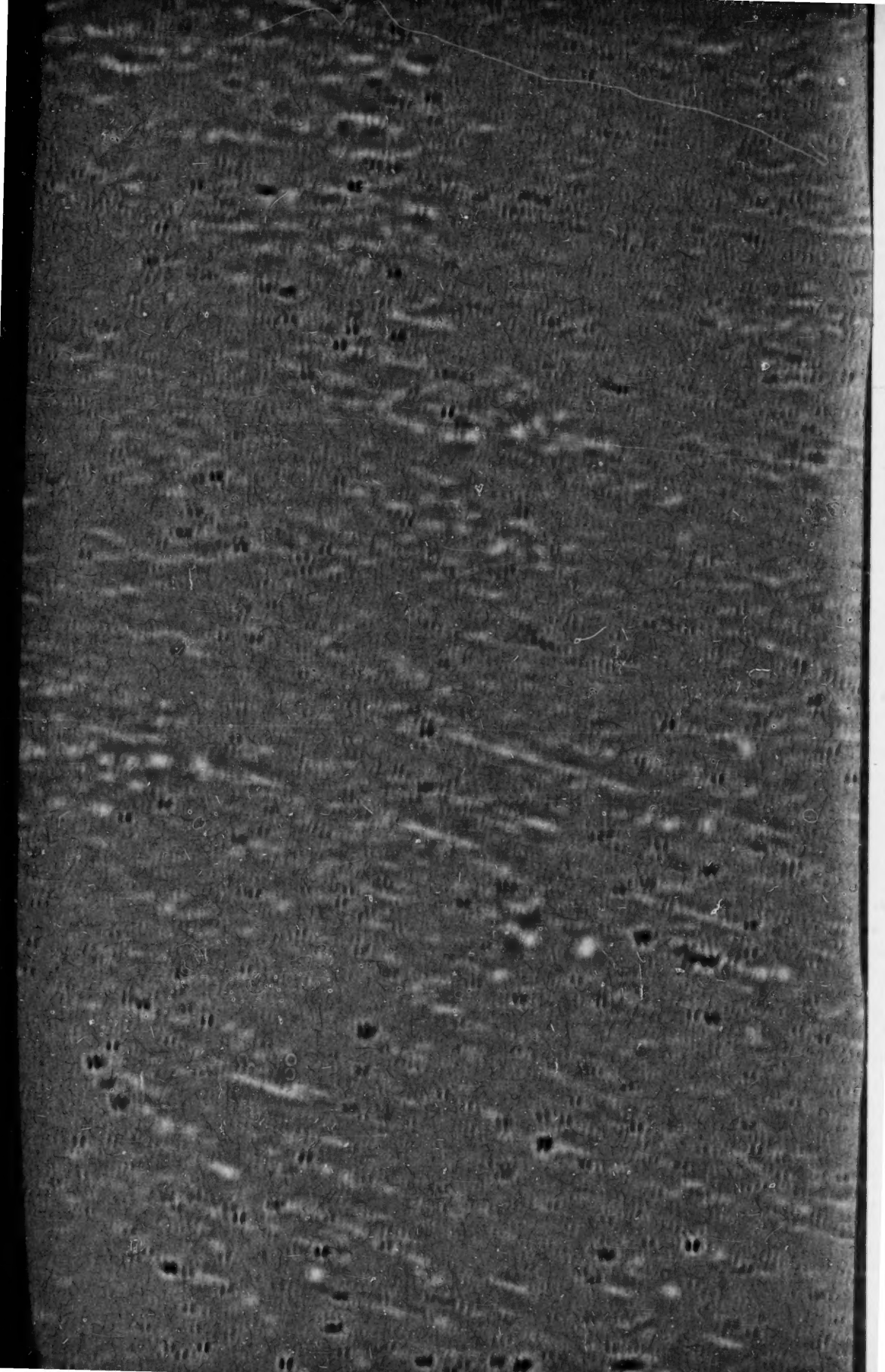

QUESTION PRESENTED

Whether, following a mistrial due to a hung jury, the retrial of petitioners on a superseding indictment that alters the original charges violates the Double Jeopardy Clause.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1463

RAY L. CORONA AND RAFAEL L. CORONA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 2-14) is reported at 804 F.2d 1568.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 1986. A petition for rehearing was denied on February 12, 1987 (Pet. App. 15-16). The petition for a writ of certiorari was filed on March 11, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In December 1984, a grand jury sitting in the United States District Court for the Southern District of Florida returned a 30-count indictment charging petitioners and four co-defendants with numerous offenses arising out of a

large-scale scheme to import marijuana.[1] After one of petitioners' co-defendants pleaded guilty, the trial of petitioners and their remaining co-defendants began in August 1985. At the close of its case-in-chief, the government moved to dismiss two counts against petitioner Ray Corona[2] and one count against both petitioners.[3] The district court entered judgments of acquittal on those counts. At the end of the ten-week trial, the jury convicted two of petitioners' co-defendants and acquitted a third. The jury was unable to reach a verdict as to petitioners, and the district court declared a mistrial. Pet. App. 3-6.

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[1]The indictment charged petitioners, along with co-defendants Jose Fernandez, Gerardo Guevara, Manuel Lopez-Castro, and William Vaughn, with racketeering and racketeering conspiracy, in violation of 18 U.S.C. 1962(c) and (d) (Counts 1 and 2); conspiring to import marijuana, in violation of 21 U.S.C. 952(a) and 963 (Count 3); importing marijuana, in violation of 21 U.S.C. 952(a) (Count 4); the use of interstate facilities to engage in a marijuana smuggling enterprise, in violation of 18 U.S.C. 1952 (Counts 5-22); mail fraud, in violation of 18 U.S.C. 1341 (Counts 23-24); and wire fraud, in violation of 18 U.S.C. 1343 (Counts 25-30). The indictment alleged 48 racketeering acts in support of the substantive racketeering charge, and 94 overt acts in furtherance of the racketeering conspiracy charge. Petitioner Ray Corona was charged in Counts 1-4, 23, and 24. Petitioner Rafael Corona was charged in Counts 1-2, 23, and 24.

The gist of the racketeering and racketeering conspiracy charges was that petitioners and their co-defendants were part of a marijuana smuggling syndicate. The syndicate was engaged in the illegal brokering of multi-ton loads of marijuana imported from Colombia, laundering the drug proceeds through various banks in the United States and the Republic of Panama, and investing the drug proceeds in the acquisition and maintenance of numerous assets in a manner concealing the identities of the true owners of the assets and disguising the source of the funds. See Gov't C.A. Br. 4-6.

[2]Counts 3 and 4 (conspiracy to import marijuana and importation of marijuana, respectively).

[3]Count 24 (mail fraud).

In December 1986, the grand jury returned an eight-count superseding indictment. The superseding indictment charged only petitioners.[4] It did not alter the general allegations contained in the original indictment, although it did modify the original indictment in certain respects.[5] In sum, the original indictment charged petitioner Ray Corona in six counts, whereas the superseding indictment charged him in seven (four of which were new); the original indictment charged petitioner Rafael Corona in four counts, whereas the superseding indictment charged him in six (three of which were new).

---

[4]The superseding indictment listed as unindicted co-conspirators former co-defendants Fernandez, Guevara, and Lopez-Castro. The superseding indictment also eliminated references to William Vaughn, who was charged in the first indictment as a co-defendant, but was acquitted by the jury at the first trial.

[5]Counts 1 and 2 of the superseding indictment charged the same racketeering offenses that were contained in the original indictment. Some racketeering acts were deleted from the substantive racketeering count and a few additional ones were added, with an overall reduction in the number of racketeering acts from 48 to 44. Many overt acts were deleted from the racketeering conspiracy charge and some additional ones were added, with an overall reduction in the number of overt acts from 94 to 65. The superseding indictment deleted the marijuana conspiracy count, the substantive marijuana importation count, and one substantive mail fraud count. The new indictment also expanded the dates of the previously alleged racketeering offenses to include allegations of continuing unlawful conduct by petitioners preceding the date alleged in the original indictment (changing January 1977 to mid-1976) and extending beyond the date the first grand jury returned the original indictment. Count 3 of the superseding indictment realleged Count 23 of the original indictment, which charged petitioner Ray Corona with mail fraud. Count 3 also expanded by one month the time frame of the scheme alleged in the original indictment (changing December 1977 to November 1977), and alleged new fraudulent acts. The superseding indictment added two mail fraud counts against both petitioners (Counts 4-5), two interstate travel counts against petitioner Ray Corona (Counts 6-7), and one interstate travel count against petitioner Rafael Corona (Count 8). Finally, all of the substantive offenses in Counts 3-8 were incorporated as acts of racketeering in the racketeering counts.

Before the start of their retrial, petitioners moved to dismiss the superseding indictment on the ground that the Double Jeopardy Clause protected them against being tried on that document. Petitioners argued that the government may not return a superseding indictment once a trial has begun and that, for double jeopardy purposes, their first trial was still "continuing" under the concept of "continuing jeopardy" discussed in *Richardson* v. *United States*, 468 U.S. 317 (1984). For those reasons, according to petitioners, the government could prosecute them only on the original indictment, and not on the superseding indictment. The district court denied petitioners' motion to dismiss (4/21/86 Tr. 33; 4/21/86 Order Denying Motion to Dismiss), as well as petitioners' motion for a stay of their retrial pending an interlocutory appeal (4/21/86 Tr. 33).

2. The court of appeals stayed petitioners' retrial pending the disposition of their interlocutory appeal (see Pet. App. 6). After hearing the case on the merits, however, the court of appeals upheld the district court's order (*id.* at 2-14). The court determined that petitioners' claim sought to "link[] together two unrelated principles of law" (*id.* at 9)—the notion of "continuing jeopardy" after a mistrial has been declared and the case is set for a retrial (see *Richardson* v. *United States, supra*), and the principle that a superseding indictment cannot be returned against a defendant once trial has begun. The latter rule, the court explained, stems not from the Double Jeopardy Clause, but from the principle that a defendant is entitled to notice of the charges against him before the beginning of his trial (Pet. App. 9-11). That requirement is satisfied in a case such as this one, the court held, as long as the accused has an opportunity to prepare a defense under a superseding indictment before the retrial commences. Thus, the court concluded that "the practical effect of a superseding indictment after a hung jury is no different from one returned with ample time before a trial on the merits" (*id.* at 11).

The court also found (Pet. App. 13) that common sense supports the conclusion that reprosecution on a superseding indictment following a mistrial is not a double jeopardy violation. As the court explained, petitioners could be retried on the original charges, and they could also be tried for the first time on the new charges, even if the jury had returned a verdict at their first trial. The court therefore found that "it makes no sense to argue, as [petitioners] do, that [petitioners], whose trial ended in a mistrial, can be retried on the same charges, and can be retried on completely separate and additional charges, but cannot be retried on some lesser amendment of the existing charges" (*id.* at 13-14 (footnote omitted)).

ARGUMENT

Petitioners do not contend that they may not be retried on the charges contained in the original indictment. Instead, they claim that they may not be retried on the superseding indictment because it amended the charges originally brought against them, even though their trial on the original indictment resulted in a mistrial due to a hung jury. That argument is plainly without substance.

The Double Jeopardy Clause protects a defendant in three different ways: it shields him from having to undergo a reprosecution for the same offense after a conviction or an acquittal; it protects him from being subjected to multiple punishments for the same offense; and it protects him against a retrial when the first trial has been improvidently terminated prior to verdict. See, *e.g.*, *Richardson* v. *United States*, 468 U.S. 317, 324-325 & n.5 (1984); *Justices of Boston Municipal Court* v. *Lydon*, 466 U.S. 294, 306-307 & n.6 (1984); *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). The first two principles have no bearing on this case: the jury at petitioner's first trial did not render a verdict on any charge in the original indictment, and petitioners were not punished for any offense. Although the third principle is

relevant here, it is well settled that a retrial following a mistrial due to a hung jury does not violate the Double Jeopardy Clause. *E.g., Richardson*, 468 U.S. at 317-318; *Arizona* v. *Washington*, 434 U.S. 497, 509 (1978); *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824). That rule is premised on the belief that "the ends of public justice would otherwise be defeated" (*Perez*, 22 U.S. (9 Wheat.) at 580) if the prosecution were denied "one complete opportunity to convict those who have violated [society's] laws" (*Washington*, 434 U.S. at 509) by treating the jury's inability to reach a verdict as the equivalent of an acquittal of the accused. See *Richardson*, 468 U.S. at 324.

The rule is no different when the government seeks to prosecute a defendant on a superseding indictment, rather than on the original indictment. To the extent that the superseding indictment contains the same charges as the original indictment, a properly declared mistrial allows the government to reprosecute the accused on those charges. *Richardson* v. *United States, supra*; *United States* v. *Perez, supra*. Insofar as the superseding indictment presents any new charges on which the accused has never been put in jeopardy, the Double Jeopardy Clause is inapplicable, since the defendant will not be reprosecuted for the "same" offense. *United States* v. *Ewell*, 383 U.S. 116, 124-125 (1966) (double jeopardy does not forbid a retrial on a new charge following the reversal of the defendant's earlier conviction). At the same time, denying the prosecution the right to bring new charges against the accused would deprive the government of an opportunity to bring a defendant to book for all of his crimes. Accordingly, the courts of appeals have uniformly recognized that the Double Jeopardy Clause is not violated by retrying a defendant, following a properly declared mistrial, on a superseding indictment, even if it modifies or increases the charges against him. *United States* v. *Cerilli*, 558 F.2d 697, 700-701 (3d Cir.), cert. denied, 434

U.S. 966 (1977); *United States* v. *White*, 524 F.2d 1249, 1253 (5th Cir. 1975), cert. denied, 426 U.S. 922 (1976); *Howard* v. *United States*, 372 F.2d 294, 300-301 (9th Cir. 1967); see also *United States* v. *Bass*, 784 F.2d 1282, 1283 n.2 (5th Cir. 1986); *United States* v. *Sonnenschein*, 565 F.2d 235, 236 (2d Cir. 1977); *United States* v. *Harris*, 542 F.2d 1283, 1313-1314 (7th Cir. 1976), cert. denied, 430 U.S. 934 (1977).

Petitioners' argument rests on a misinterpretation of this Court's decision in *Richardson* v. *United States, supra*. Although *Richardson* explained that a defendant's jeopardy continues when a trial ends in a hung jury, *Richardson* did not suggest that the trial itself should be regarded as still ongoing. The concept of "continuing jeopardy" expressed in *Richardson* is simply a shorthand way of saying that a defendant may be retried after a properly declared mistrial because his first trial did not result in a final judgment of conviction or acquittal. For double jeopardy purposes, then, a properly declared mistrial, like the one in this case, places a defendant in the same position that he occupied before his first trial began. And, as the court of appeals explained (Pet. App. 9-11), the government may seek the return of a superseding indictment at any time prior to the start of trial.[6]

There is nothing about the superseding indictment in this case that requires special treatment. Most of the differences between the original and superseding indictments are

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[6]Petitioner's argument that the government cannot seek a superseding indictment once trial has begun is correct but immaterial to the double jeopardy question in this case. As the court of appeals explained (Pet. App. 9-11), the government may seek a superseding indictment once the trial has begun because a defendant has the right to know the charges against him before trial. That guarantee does not stem from the Double Jeopardy Clause, and petitioners have cited no case remotely suggesting that it does.

trivial,[7] and none of the remaining changes implicates any double jeopardy concern. For example, while the superseding indictment added some new charges against petitioners, there is nothing objectionable about that. As the court of appeals explained (Pet. App. 13-14 n.2), the government could have sought a separate indictment containing those charges and could have joined both indictments at petitioner's retrial. Fed. R. Crim. P. 13. The superseding indictment also expanded the scope of the racketeering conspiracy and mail fraud charges in the first indictment. But those changes are unobjectionable, since petitioners received ample notice of the revised charges and had not had a final judgment entered on the prior version of those charges. Finally, while the superseding indictment alleged new overt acts committed by petitioners in furtherance of the racketeering conspiracy, that change is of no consequence, since the government need not prove an overt act in furtherance of a racketeering conspiracy to begin with. *E.g., United States* v. *Coia*, 719 F.2d 1120, 1123-1124 (11th Cir. 1983), cert. denied, 466 U.S. 973 (1984). The inclusion of new overt acts in the superseding indictment only benefited petitioners by giving them additional notice of the government's anticipated proof at their second trial.[8]

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[7]For the most part, the superseding indictment simply reiterates charges or allegations contained in the original indictment. To that extent, petitioners' argument at most goes not to the substance but to the form of the indictment, which is not a concern of the Double Jeopardy Clause. The superseding indictment also deleted charges relating to petitioners' co-defendants. To that extent, no right of petitioners has been (or could be) violated. In fact, charges in an indictment may be narrowed or dropped at trial itself. *United States* v. *Miller*, 471 U.S. 130 (1985). Similarly, petitioners have no ground to object to the deletion from the superseding indictment of the charges in the first indictment that were dismissed at petitioners' first trial.

[8]Petitioners complain (Pet. 14) that the court of appeals' ruling allows the government to use a first trial "as a test run of its case." That concern is entirely unjustified. It is absurd to suggest that the government

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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manipulated this ten-week trial to obtain a hung jury simply to "test run" its evidence. In fact, petitioners were the likely beneficiaries of the hung jury, since they had a preview of most of the government's case in advance of their retrial, and will therefore be better prepared to challenge the particular aspects of the government's proof.